

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY MCNEAL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITANK PHILADELPHIA, INC.	:	
AND/OR TANKCLEANING INC.	:	
and	:	
MARITRANS HOLDINGS, INC.	:	
and	:	
MARITRANS GP INC.	:	NO. 97-0890

MEMORANDUM AND ORDER

HUTTON, J.

January 29, 1999

Presently before the Court are the Plaintiff's Motion to Strike Defendants' Fourth Affirmative Defense and Motion for Partial Reconsideration (Docket No. 70) and Defendants' reply thereto (Docket No. 74). Also before the Court is Defendants' unopposed Motion to Amend the Pleadings (Docket No. 75). Finally, also before the Court are Defendants' Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment for Lack of Subject Matter Jurisdiction (Docket No. 73), Plaintiff's Response to Motion for Summary Judgment and Cross-Motion to Amend Complaint to Join Maritrans, Inc. (Docket No. 77), Defendants' Reply thereto (Docket No. 78), and Defendant's Opposition to Plaintiff's Motion to Amend Complaint to Join Maritrans, Inc. (Docket No. 79).

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. Plaintiff Larry McNeal was born on September 3, 1943, and was just under fifty years of age in the spring of 1993, when the following events took place. On February 14, 1993, Defendant Maritank Philadelphia Inc. ("Maritank") ran an advertisement for an "Operator" position at its petroleum storage facility in the "Help Wanted" section of a newspaper called the Delaware County Sunday Times. Maritank employed fewer than twenty-five employees and was a wholly owned subsidiary of Defendant Maritrans Holding Inc. ("Maritrans Holdings"). Maritrans Holding Inc. was a wholly owned subsidiary of Maritrans Inc. ("Maritrans"). McNeal saw the ad and responded by sending in a resume, and at some point in late February or early March, someone at Maritank contacted McNeal and invited him to appear for a written examination.

On March 10, 1993, McNeal and seven other male applicants met at Maritank to take a multiple-choice examination required for the Operator position. The exam tested the applicants' skills in arithmetic, mechanical aptitude, and reading comprehension. Although he did not inquire about their ages, McNeal believed the other men appeared "considerably younger" than himself. At the exam, McNeal and another applicant, Joseph Borsello, briefly

discussed the problem of age discrimination. Borsello, who was forty-four at the time, mentioned to McNeal that he had been experiencing age discrimination with other companies.

Initially, McNeal failed the Operator exam. Of the eight men who had taken the exam, only Borsello passed. Borsello advanced to the next stage of Maritank's hiring process, and was hired as an Operator on April 9, 1993. A few weeks later, however, Maritank lowered its testing standards. Because McNeal satisfied the revised standards, Maritank called him on April 16, 1993 and invited him in for an interview. Of the remaining seven applicants, only McNeal received an interview.

In late April, McNeal came in to Maritank and interviewed with Edward Wrezniewski, an Operator/Foreman and mechanic. At the interview, Wrezniewski asked McNeal to complete several forms. One of these forms, entitled "Notice to Applicant," recites that "any applicant offered employment with Maritank Philadelphia Inc. is required to undergo and pass a preemployment physical [examination]." McNeal took these forms home, completed them, and returned them to Maritank right away. Several days after the interview, Maritank's Manager of Administration, Constance M. Blinebury, called McNeal at home and advised him that the interview had gone very well. Blinebury then asked McNeal to go to Penn Diagnostic Center, Inc. for the required physical exam.

In 1992, well before the operative events in this litigation

took place, Maritank hired an outside consultant, Danmar Associates, to evaluate its Operator position and draft a Job Description and ADA Analysis. The description and analysis, together sixteen-pages long, examine the daily requirements of the position in excruciating detail, and conclude that "[t]he Plant Operator position would be federally classified as very heavy work." A checklist summary the ADA Analysis states that, on average, a Plant Operator must lift and carry up to fifty pounds approximately three to five hours a day, and between fifty and one hundred pounds approximately one to three hours a day.

In addition to commissioning the Danmar ADA analysis, Maritank retained the physicians of Penn Diagnostic to conduct pre-employment physical examinations. Maritank carefully explained the nature of the Operator position to the physicians, and even brought them to Maritank's facility to observe and evaluate the nature of the position for which the doctors would be screening prospective employees. Finally, Maritank provided the physicians with copies of Danmar's description and analysis of the Operator position. Therefore, the Penn Diagnostic physicians were well acquainted with the nature and requirements of Maritank's Operator position.

On May 3, 1993, McNeal went to Penn Diagnostic for an examination with consulting physician Dr. Jack Stein. In the course of the exam, Penn Diagnostic took x-rays of McNeal's back and spine. Dr. Stein reviewed these x-rays and asked McNeal

whether he had ever experienced any lower back problems. McNeal stated that two years earlier he had injured his back lifting a safe, but that he had no history of job-related injuries. After reviewing the x-rays, discussing McNeal's medical history, and consulting the other physicians in his group, however, Dr. Stein concluded that McNeal had a back defect--congenital L4-5 spondylolysis without listhesis--and should not perform a job that involved heavy-duty lifting. Under the procedures established by Maritank and Penn Diagnostic, Dr. Stein then notified Blinebury that McNeal was "unfit" for the Operator position without communicating the specifics of McNeal's medical condition. Thereafter, on May 10, 1993, Blinebury contacted McNeal and informed him that he had not passed the physical examination, and that Maritank could not take him on for the Operator position.

McNeal protested Dr. Stein's finding and Maritank's decision. On May 11, 1993, McNeal called Dr. Stein and demanded to know why he had failed the physical examination. McNeal claims Dr. Stein told him that he had not failed the exam, but that he had merely mentioned McNeal's spondylolysis condition to Maritank. McNeal then called Blinebury and told her that Dr. Stein had said that he passed the physical, and mentioned the ADA in the conversation. On May 12, 1993, Dr. Stein called McNeal wanting to know why McNeal told Blinebury he had passed the physical. McNeal then called Blinebury and explained that he had performed heavy lifting of oil

drums for twenty-three years for a former employer, and had never been injured or missed work due to heavy lifting-related back problems. He told them that his personal physician could confirm his statements about heavy lifting, and corroborate that he had never suffered a job-related back injury. On May 14, 1993, however, McNeal received a letter from Blinebury advising him that he did "not meet the requirements for the job as Operator at Maritank Philadelphia Inc." At some point thereafter, McNeal received a separate letter from Dr. Stein explaining his diagnosis and recommendation.

Believing he was fully qualified to perform the Operator position with or without reasonable accommodation, and that his age may have played some role in Maritank's decision, McNeal brought his grievance to the Equal Employment Opportunity Commission ("EEOC"). He filled out an affidavit charging Maritank with discrimination on May 20, 1993. McNeal then filed similar charges with the Pennsylvania Human Relations Commission ("PHRC") on October 29, 1993, which were dual-filed with the EEOC. On April 26, 1995, McNeal received notice from the PHRC that it had dismissed his case without a finding of discrimination, and that he could proceed with a private action under the PHRA. Finally, on November 8, 1996, McNeal received his federal right-to-sue letter from the EEOC.

McNeal filed his Complaint on February 5, 1997. In this action, Plaintiff McNeal sued Defendants Maritank Philadelphia, Inc. and/or Tankcleaning, Inc., Maritrans Holdings, Inc., and Maritrans GP, Inc. ("Maritrans GP")¹ for alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA") (Count I), the corresponding provisions of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. ("PHRA") (Count II), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") (Count III). Counts I and II charge the Defendants with discrimination on the basis of a perceived disability--namely its perception of him as a person who might be especially prone to back injuries. Count III recites that McNeal is over forty years of age, and charges Maritank with age discrimination, in violation of the ADEA. Maritank filed an answer which included as their fourth affirmative defense the following: "Defendants' decision not to employ Plaintiff was lawful, since its decision was predicated upon Plaintiff's failure to pass a physical examination following a conditional offer of employment."

After a particularly tortured history of pre-trial discovery, Maritank filed motions for partial summary judgment. On June 30, 1998, this Court granted summary judgment in favor of Defendants on

¹ As Maritrans GP Inc. no longer exists, the parties stipulated to the dismissal of Maritrans GP Inc. as a defendant in this matter.

Counts II, III, and IV.² See McNeal v. Maritank Phila. Inc., No. CIV.A.97-0890, 1998 WL 404023, at *9 (E.D. Pa. July 1, 1998). Thus, at this time, only the ADA claim asserted in Count I remains.

On July 15, 1998, Plaintiff filed a Motion to Strike Defendants' Fourth Affirmative Defense and Motion for Partial Reconsideration. On October 21, 1998, Defendants filed a Motion to Amend the Pleadings. Also on October 21, 1998, Defendants filed a Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment for Lack of Summary Judgment. Finally, in response to this motion, Plaintiff filed a Cross-Motion to Amend the Complaint on December 18, 1998. In this memorandum and order, the Court addresses all of these motions.

II. DISCUSSION

A. Plaintiff's Motion to Strike and Defendants' Motion to Amend Pleadings

The Plaintiff moves this Court to strike Defendants' fourth affirmative defense as legally insufficient. In response, Defendants filed a motion to amend the pleadings. In this motion, Defendants agreed to voluntarily withdraw its fourth affirmative defense. Thus, Plaintiff's motion to strike is granted.

However, Defendants move for leave to amend the answer to restate their fourth affirmative defense. The Plaintiff did not

² McNeal also asserted, but later retracted, a claim of common law negligence (Count IV). Accordingly, in the June 30, 1998 order, the Court granted summary judgment in favor of the Defendants on this claim.

respond to the Defendants' motion to amend. Thus, the Court treats the motion as an uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. See E.D. Pa. R. Civ. P. 7.1(c). Rule 7.1(c) states that, except for summary judgment motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested" Id. Therefore, the Court grants Defendants' motion to amend.

B. Plaintiff's Motion for Partial Reconsideration

1. Standard

"The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1." Vaidya v. Xerox Corp., No. CIV.A97-547, 1997 WL 732464, at *1 (E.D. Pa. Nov. 25, 1997). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also Drake v. Steamfitters Local Union No. 420, No. CIV.A97-CV-585, 1998 WL 564886, at *3 (E.D. Pa. Sept. 3, 1998). Generally, a motion for reconsideration will only be granted on one of the following three grounds: (1) there has been an intervening change in controlling

law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. See Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994); see also D'Allesandro v. Ludwig Honold Mfg. Co., No. CIV.A95-5299, 1997 WL 805182, at *1 (E.D. Pa. Dec. 18, 1997). A motion for reconsideration may not be used to present a new legal theory for the first time or to raise new arguments that could have been made in support of the original motion. See Vaidya v. Xerox Corp., No. CIV.A.97-547, 1997 WL 732464, at *2 (E.D. Pa. Nov. 25, 1997).

2. The PHRA Claim

The Plaintiff moves for partial reconsideration of this Court's order granting summary judgment in favor of the Defendants on Plaintiff's PHRA claim. The Court granted summary judgment based upon Action Industries, Inc. v. Pennsylvania Human Relations Commission, 518 A.2d 610, 611 (Pa. Cmwlth. 1986). That case established a special safe-harbor for employers charged with disability discrimination who reasonably relied upon the opinion of a medical expert in deciding not to hire a certain job applicant. See id. at 612-13. The Court found that the present case was almost identical to the facts of Action Industries and granted summary judgment in Defendants' favor as to Plaintiff's PHRA claim on this ground. See McNeal, 1998 WL 404023, at *7-8.

In his motion for reconsideration, Plaintiff contends that

Action Industries is no longer the controlling law in Pennsylvania.³ However, Plaintiff failed to raise this argument in his original response to Defendants' motion for summary judgment. See id. at *8 n.5. Therefore, because the Plaintiff is raising new arguments that he failed to make in his original response, the Court denies the motion for partial reconsideration.⁴ See Vaidya, 1997 WL 732464, at *2 (noting that a motion for reconsideration may not be used to present a new legal theory for the first time or to raise new arguments that could have been made in support of the original motion or response).

C. Defendants' Motion to Dismiss/Motion for Summary Judgment

³ The Plaintiff does not rely on any case law finding that Action Industries is no longer controlling. Rather, Plaintiff argues that this Court is not bound by decisions of intermediate state appellate courts. Plaintiff contends that this Court should predict that the Supreme Court of Pennsylvania would disagree with the Action Industries decision.

As support for this argument, Plaintiff relies on the treatment by the federal courts of Hoy v. Angelone, 456 Pa. Super. 596 (1997). In Hoy, the Superior Court of Pennsylvania found that punitive damages were not available under the PHRA. See id. at 600. Several federal courts rejected this conclusion in Hoy. These federal courts predicted that the Supreme Court of Pennsylvania would permit punitive damages under the PHRA based upon the argument that the PHRA is generally interpreted in accordance with its federal statutory counterparts-- Title VII, ADA, ADEA. Along the same lines, Plaintiff contends that this Court should reject the Action Industries defense because it is not available under the ADA.

Interestingly, after Plaintiff filed his motion for reconsideration, the Pennsylvania Supreme Court agreed with the Hoy decision and found that punitive damages are not available under the PHRA. See Hoy v. Angelone, 720 A.2d 745, 751 (Pa. 1998). This decision, along with proving several federal courts wrong, is further support that this Court properly granted summary judgment based upon the Action Industries decision.

⁴ The Court notes that the Plaintiff moves for reconsideration based upon the alleged manifest injustice that would result if the Court dismissed his PHRA claim relying on law that was no longer controlling. The Court, however, remains convinced that Action Industries is still the controlling law in Pennsylvania. Therefore, no manifest injustice resulted from the dismissal of Plaintiff's PHRA claim.

1. Standards

a. Motion to Dismiss Standard

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),⁵ this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The Court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell

⁵ Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

b. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's

evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. The ADA Claim

In the instant motion, Maritank seeks to dispose of McNeal's sole remaining claim under the ADA. In their motion, Defendants argue that this Court should dismiss or grant summary judgment because it lacks subject matter jurisdiction under the ADA as McNeal's employer, Maritank Philadelphia Inc., did not have twenty-five (25) employees at the time of the alleged discriminatory conduct. In his response, Plaintiff concedes that Maritank Philadelphia Inc. had less than twenty-five (25) employees at the time of the alleged discriminatory conduct. Nonetheless, Plaintiff argues that dismissal and summary judgment are not proper because Maritank Philadelphia Inc., Maritank Maryland Inc., Maritrans Holdings, Inc., and Maritrans, Inc. comprise a "single employer" or "integrated enterprise" which employed more than twenty-five employees during the alleged discrimination.

a. The ADA

Under the ADA, a "covered entity" is prohibited from discriminating against a "qualified individual with a disability, because of the disability of such individual in regard to job

application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). Section 101(2) defines "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee." Id. § 12111(2). Section 101(5) provides, in pertinent part: "The term . . . employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person."⁶ Id. § 12111(5)(A).

b. The Single Entity or Integrated Enterprise Test

In an ADA action,⁷ if an entity itself employs less than the statutory requisite number of employees, application of single entity theory may increase the number of employees in satisfaction of the jurisdictional minimum. See Martin v. Safeguard Scientifics, Inc., 17 F. Supp.2d 357, 361 (E.D. Pa. 1998). The parties urge the Court to use a four factor test to determine if

⁶ The twenty-five employee floor applies only for the first two years following the effective date of the ADA. See 42 U.S.C. § 12111(5)(A). After that date, the statute will apply to employers with fifteen (15) or more employees. See id. The ADA became effective twenty-four (24) months after enactment, on July 26, 1992. Thus, the twenty-five employee cut off applies through July 26, 1994, and is applicable in this case.

⁷ The term "employer" is defined in the ADA as it is in Title VII. See Cohen v. Temple Physicians, Inc., 11 F. Supp.2d 733, 736 (E.D. Pa. 1998) (noting that when courts address questions of individual liability under the ADA, ADEA and Title VII, courts look to case law under all three statutes, because definitions of "employer" are virtually identical). Therefore, principles developed in case law under Title VII are instructive on the issue in this case. See id.

the apparently independent entities in this case are actually a "single employer." Although there is no Third Circuit Court of Appeals case that expressly adopts this four factor "single employer" or "integrated enterprise" test,⁸ the Third Circuit has approved the test in other circumstances in Marzano v. Computer Science Corp., 91 F.3d 497, 502 (3d Cir. 1996).⁹ This Court concludes, therefore, that the four-factor "single employer" or "integrated enterprise" test is most appropriate. See Martin, 17

⁸ This "single employer" test is commonly referred to as the "integrated enterprise test." See, e.g., Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir. 1993); Beckwith v. International Mill Servs., Inc., 617 F. Supp. 187, 189 (E.D. Pa. 1985). Courts have applied other tests as well, such as an agency theory, "alter ego" test and "instrumentality" test. However, the factors examined in these cases are essentially the same as those used in an "integrated enterprise" analysis and the "integrated enterprise" test is the one used most frequently by other circuits. See, e.g., Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 994 (6th Cir. 1997); Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 582 (7th Cir. 1993); Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981 (4th Cir. 1987).

⁹ In Marzano, a female employee brought a Title VII discrimination action against her former employer and its parent corporation. See Marzano, 91 F.3d at 512. In its opinion, the Third Circuit addressed a parent corporation's liability for the employment decisions of a wholly owned subsidiary. See id. The court, in determining the appropriate standard for deciding whether or not the parent could be held liable, turned to principles of corporate law and framed the issue as one of whether the corporate veil could be pierced. See id. While examining New Jersey law, the court first noted that shareholders are normally "insulated from the liabilities of corporate enterprise ... [e]ven in the case of a parent corporation and its wholly owned subsidiary" Id. (internal quotations omitted). To strip entities of that insulation, a court must find that a "subsidiary was a mere instrumentality of the parent corporation ... [that is, that] the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent." Id. While the Third Circuit did not adopt a specific test, three of the factors it mentioned are in the "single employer" or "integrated enterprise" test.

There is a principal factual difference between the case at bar and the situation in Marzano. In Marzano, the plaintiff sought to hold the parent corporation of a wholly owned subsidiary liable. See Marzano, 91 F.3d at 512. In this case, the Plaintiff seeks to use the single employer test to demonstrate that, together, the Defendants employed more than twenty-five employee during the alleged discrimination and, thus, are covered entities under the ADA. In either case, however, a parent corporation may be liable for a subsidiary's discrimination. Therefore, the Court concludes that this four factor test used in Marzano is the appropriate test in this case.

F. Supp.2d at 363; see also Daliessio v. Depuy, Inc., CIV.A.96-5295, 1998 WL 24330 (E.D. Pa. Jan. 23, 1998) (employing the "integrated enterprise test" on motion to dismiss in context of determining whether defendants were "employers" within the meaning of Title VII).

The single employer or integrated enterprise test considers the following: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial controls. See Martin, 17 F. Supp.2d at 362. All four criteria of the test need not be present in all cases and the presence of any single factor is not conclusive. See id. A review of the case law, however, shows that the four-pronged inquiry is not to be rigidly applied. See id. Some factors have more weight than others. See id. "Sole ownership alone is never enough to establish parent liability" as there is a "strong presumption" that a parent is not the employer of its subsidiary's employees. Id. at 363. Indeed, courts have found parent corporations to be employers only in extraordinary circumstances. See id.

c. Evidence of "Single Employer" or "Integrated Enterprise" Status

With this test in mind, the Court now turns to the facts in this case. The parties produced a voluminous record for the Court's inspection. The Court briefly addresses the evidence under

each of the four factors of the single employer or integrated enterprise test.

As an initial matter, however, the Court concludes that Maritank Philadelphia and Maritank Maryland, Inc. were sufficiently intertwined to describe them as a single employer or integrated enterprise. Maritank Philadelphia paid Maritank Maryland's payroll. Moreover, Brian Adamsky, General Manager of Maritank Philadelphia, and Constance Blinebury, Manager of Administration of Maritank Philadelphia, managed Maritank Maryland. Defendants concede that Maritank Philadelphia provided "substantial management services" to Maritank Philadelphia. Because Maritank Philadelphia and Maritank Maryland ranged from a low of 16 employees to a high of 24 employee from 1992 to 1994, the Court must still undertake the analysis of the single employer or integrated enterprise test with respect to Maritrans and Maritrans Holdings.¹⁰

(1) Common Ownership

The element of common ownership is not at issue in this case. It is undisputed that Maritank was wholly owned by Maritrans Holdings. Moreover, Maritrans Holdings was wholly owned by Maritrans. Thus, the element of common ownership is met.

¹⁰ Defendants note that Maritrans Holdings had no employees during the relevant period. Nevertheless, Maritank is wholly owned by Maritrans Holdings, who is or was wholly owned by Maritrans. The Court, therefore, finds that it is still important to include Maritrans Holdings in the single employer or integrated enterprise analysis.

(2) Common Management

The Court finds that the Plaintiff demonstrated a genuine issue of material fact concerning whether Maritank, Maritrans Holdings, and Maritrans had common management. To the outside world, it appeared that Maritank was run by Edward Flood and James Sanborne, as Maritank's Board of Directors, and Brian Adamsky as Maritank's General Manager. Adamsky, who was hired by employees of Maritrans and not Maritank, was apparently "not up to the job." See Dep. of Craig Johnson at 34. Adamsky often consulted, if not deferred, to Flood on many decisions at Maritank. While Flood was an employee of Maritrans, he was often referred to as President of Maritank even though the position was eliminated. Flood also had a big office at Maritank.

The Plaintiff presented evidence that the management and control of these nominally independent corporations may have been effectively in the hands of an "oversight" committee. This committee, which included Stephen Van Dyck, Chief Executive Officer (CEO) of Maritrans, Craig Johnson, Chief Operating Officer of Maritrans (COO) of Maritrans, Gary Schaefer, Chief Financial Officer (CFO) of Maritrans, James Sanborne, Board of Director of Maritank, and Edward Flood, former President of Maritank, Chairman of the Board of Maritank, and employee of Maritrans, would regularly hold "oversight meetings." Id. Because he had an important role at Maritrans and Maritank, Flood was the key

participant in these "oversight meetings." These meetings were often secretive and the minutes of the meetings were never taken. See id. In addition, Sanborne-- despite being a Board of Director of Maritank-- testified at his deposition that the agenda of these "oversight meetings" was prepared by whoever was "running Maritank at the time." Id. Therefore, this Court concludes that a reasonable jury could conclude that these apparently independent corporations were actually controlled by this oversight committee and, thus, the element of common management is met.

(3) Inter-relation of Operations

This Court finds that, although Defendants contend that each corporation is engaged in a separate industry, it is more accurate to state that each corporation contributed something to a "integrated package." Plaintiff offered sufficient evidence at this stage to show that the creation of Maritrans, Maritrans Holdings, and Maritank was part of a bigger plan within the company to offer transportation, terminalling, and distribution of oil products in Philadelphia and elsewhere. According to Maritrans own Annual Report in 1993, this "service package is entirely unique in [the] industry." As part of this "package," Maritank would provide the terminalling. Therefore, the Court finds that a reasonable jury could conclude that Maritank was simply a division of Maritrans in their goal to provide this complete package in the oil industry.

Defendants respond that this argument is meritless because the service package was an intended plan. This Court disagrees. Even if these corporations set up businesses with only the intention of creating a "package" plan, these actions alone could create an inter-relation of operations even though the plan was never brought to fruition or sold to any potential customers.

Finally, the integrated nature is most simply demonstrated by the master Maritrans telephone list which contains telephone numbers of Maritank employees. See Doe v. William Shapiro Esquire, P.C., 852 F. Supp. 1246, 1249 (E.D. Pa. 1994) (finding that the integrated nature of defendant corporations was most notably demonstrated by the official phone list which listed all defendant corporation as one arm of main corporation). Therefore, the Court finds that this element is met.

(4) Centralized Control of Labor Relations

Lastly, the Court finds that Plaintiff offered evidence-- albeit a scintilla of evidence-- that there was centralized control of labor relations. Defendants concede that Edward Flood had approval power over employment policies at Maritank. Indeed, Flood approved or made numerous decisions which led to the creation of the position McNeal sought. In addition, Flood approved of lowering the test scores which allowed McNeal to qualify for the operator position. Finally, Flood was present at several of the meetings concerning hirings, firings, or other employment action.

However, as Plaintiff admits, Flood was not involved in the decision not to hire McNeal. Furthermore, Plaintiff failed to offer much evidence to suggest that Maritrans employees made decisions regarding McNeal. Despite this lack of strong evidence, Plaintiff submits that it is not dispositive. For example, Plaintiff argues that given the evidence that a select few actually controlled much of the operations of this alleged integrated enterprise, the refusal to hire McNeal may have been made at a much higher level. Interestingly, no one at the company could offer a satisfactory explanation for Flood's presence at many of the meetings discussing staffing issues or why Flood was updated "regularly" regarding these issues. See Dep. of Constance Blinebury (12/8/97) at 37. Thus, Plaintiff argues that, when examining the evidence concerning this element with the substantial evidence on the other elements, there is sufficient evidence to raise an issue for trial. See Doe, 852 F. Supp. at 1249 ("In applying this four-factor test, courts appear to take a 'totality of the circumstances' approach to the issue, treating the factors as guideposts rather than as items on a checklist.").

d. Conclusion

Despite the scintilla of evidence offered regarding the element of centralized control of labor relations, the Court finds that Plaintiff raised a genuine issue of material fact concerning whether Maritrans, Maritrans Holdings, Maritank Philadelphia, and

Maritank Maryland were a single employer or integrated enterprise. Examining all four factors of the single employer or integrated enterprise test together in the light most favorable to Plaintiff, the Court concludes that Plaintiff produced sufficient evidence to satisfy the appropriate test. Accordingly, the Court denies Defendants' motion to dismiss, or, in the alternative, for summary judgment.

D. Plaintiff's Cross-Motion to Amend the Complaint

1. Standard

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Because the Plaintiff seeks to amend their complaint long after the Defendant served their responsive pleading, the Plaintiff "may amend [their complaint] only by leave of court." Fed. R. Civ. P. 15(a). Rule 15(a) clearly states that, "leave shall be freely given when justice so requires." Id. "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (citations omitted); see also Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). The Third Circuit has found that "prejudice to the non-moving party is the touchstone for denial of an amendment." Id. at 1414.

2. Amending the Complaint to Join Maritrans, Inc.

Finally, Plaintiff moves for leave to file an amended complaint to join Maritrans, Inc as a Defendant. This Court finds that leave should be granted. In his original complaint, Plaintiff originally sued Maritrans GP as the parent corporation of Maritank. Maritrans GP was dissolved and Maritrans assumed its assets and liabilities. Thus, during these entire proceedings, Maritrans was aware and put on notice of any claims against it by McNeal.

Furthermore, this Court cannot find any resulting prejudice from permitting Plaintiff to file an amended complaint to join Maritrans. See id. (noting that prejudice is the touchstone for denying an amendment). Defendants contends that Plaintiff delayed so long in naming Maritrans as a defendant that important witness have died. Thus, Defendants argue that Maritrans will be unable to properly defend itself. This Court disagrees. These deceased were not only important to Maritrans, but they were also important to the current Defendants who seek to argue that they are not a single employer or integrated enterprise. Therefore, the Court finds that Maritrans will not suffer prejudice and grants Plaintiff's motion to amend.¹¹

An appropriate order follows.

¹¹ In their motion to dismiss, Defendants argue that Maritrans should be dismissed because it was not named as a defendant in this matter. Because the Court grants the Plaintiff leave to join Maritrans, it need not resolve this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY MCNEAL	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITANK PHILADELPHIA, INC.	:	
AND/OR TANKCLEANING INC.	:	
and	:	
MARITRANS HOLDINGS, INC.	:	
and	:	
MARITRANS GP INC.	:	NO. 97-0890

O R D E R

AND NOW, this 29th day of January, 1999, upon consideration Plaintiff's Motion to Strike Defendants' Fourth Affirmative Defense and Motion for Reconsideration (Docket No. 70), Defendants' Motion to Amend the Pleadings (Docket No. 75), Defendants' Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment for Lack of Subject Matter Jurisdiction (Docket No. 73), and Plaintiff's Cross-Motion to Amend Complaint to Join Maritrans, Inc. (Docket No. 77), IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion to Strike Defendants' Fourth Affirmative Defense is **GRANTED**;

(2) Defendants' unopposed Motion to Amend the Pleadings is **GRANTED**;

(3) Plaintiff's Motion for Partial Reconsideration is **DENIED**;

(4) Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment is **DENIED**;

(5) Plaintiff's Cross-Motion to Amend Complaint is **GRANTED**;

(6) Plaintiff has twenty (20) days from the date of this Order to file an amended complaint to join Maritrans, Inc. as a Defendant; and

(7) Defendants have twenty (20) days from the date that Plaintiff files his amended complaint to file an amended answer to restate their fourth affirmative defense.

BY THE COURT:

HERBERT J. HUTTON, J.